

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

Plaintiff

v.

CRIMINAL 06-0060 (JAG)

IVÁN CABRERA-GARAY,

Defendant

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION  
RE: RULE 11 PROCEEDINGS (PLEA OF GUILTY) AND WAIVER  
OF INDICTMENT AND AGREEMENT TO PROCEED BY INFORMATION

**I. Personal Background**

An information was filed in open court on February 21, 2006, charging defendant with knowingly and willfully conspiring, confederating, and agreeing with others, to commit offenses against the United States, that is, to knowingly devise a scheme and artifice to defraud and obtain money from insurance companies by means of false and fraudulent pretenses and representations and promises by intentionally submitting false and fraudulent claims for automobile insurance which caused and resulted in the mailing through the United States Postal Service, among others, of extension of time letters to the "Oficina del Comisionado de Seguros de Puerto Rico," false and fraudulent receipt of claim letters and checks, by the insurance companies. All in violation of 18 U.S.C. §§ 371 and 1341.

**II. Consent to Proceed Before a Magistrate Judge**

On February 21, while assisted by Olga Shepard de Mari, Esq., the defendant, by consent, appeared before me in order to waive his right to prosecution by indictment and to plead guilty to a one count information. The defendant agreed to proceed by way of information and waived his right to be charged with an indictment. The defendant informed that he understood the charges which he faced

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and was informed of his constitutional right to be charged in an indictment, a right which he could waive if he consents to being charged by information of the United States Attorney. He noted that he had discussed this with his attorney and acknowledged that no threats or promises had been made to him to waive indictment and proceed by way of information. In open court the defendant was questioned as to the purpose of the hearing being held. The defendant responded that the purpose of the hearing was to accept responsibility or plead guilty. The defendant was advised of his right to have all proceedings, including the change of plea hearing, before a United States district judge. He was given notice of: (a) the nature and purpose of the hearing; (b) the fact that all inquiries were to be conducted under oath and that it was expected that his answers would be truthful; and (c) his right to have the change of plea proceedings presided over by a district judge instead of a magistrate judge. The defendant was also explained the differences between the appointment and functions of the two. The defendant consent to proceed before this magistrate judge.

### III. Proceedings Under Rule 11, Federal Rules of Criminal Procedure

#### A. Compliance With Requirements Rule 11(c)(1)

Rule 11 of the Federal Rules of Criminal Procedure governs the acceptance of guilty pleas to federal criminal violations. Pursuant to Rule 11, in order for a plea of guilty to constitute a valid waiver of the defendant's right to trial, guilty pleas must be knowing and voluntary: "Rule 11 was intended to ensure that a defendant who pleads guilty does so with an 'understanding of the nature of the charge and consequences of his plea.'" United States v. Cotal-Crespo, 47 F.3d 1, 4 (1<sup>st</sup> Cir. 1995) (quoting McCarthy v. United States, 394 U.S. 459, 467 (1969)). [There are three core concerns in these proceedings]: 1) absence of coercion; 2) understanding of the charges; and 3) knowledge of the consequences of the guilty plea. United States v. Cotal-Crespo, 47 F.3d at 4 (citing United States v. Allard, 926 F.2d 1237, 1244-45 (1<sup>st</sup> Cir. 1991)).

United States v. Hernández-Wilson, 186 F.3d 1, 5 (1<sup>st</sup> Cir. 1999).

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3 In response to further questioning, defendant noted that he understood that  
4 if convicted, he was exposed to a maximum imprisonment term of not more than five  
5 years and a fine not to exceed \$250,000, and a term of supervised release of not  
6 more than three years.

7 At the time of the signing of this plea agreement, the defendant will pay a  
8 special assessment of \$100 as to the count charged in the pending information, to  
9 be deposited in the Crime Victim Fund, as required by 18 U.S.C. § 3013(a).

10 The defendant understands and acknowledges that parole has been abolished.

11 Defendant was explained what the supervised release term means. He was  
12 advised that in passing sentence the court had to consider the criteria fixed by the  
13 sentencing guidelines; the factors to be considered under such guidelines; the fact  
14 that the court could abide by the recommended sentencing range or depart from that  
15 range, and that, in doing so, the court could and would consider all relevant facts.  
16 It was emphasized that cooperation with the United States Probation Officer would  
17 assist the court in reaching a fair sentence.

18 Emphasis was made on the fact that at this stage, no prediction or promises  
19 as to the sentence to be imposed could be made by anyone. Defendant responded to  
20 questions in that no promises, threats, force or predictions as to what sentence will  
21 be imposed have been made to him.

22 **B. Admonishment of Constitutional Rights**

23 To assure defendant's understanding and awareness of his rights, defendant  
24 was advised of his right:

25 1. To remain silent at trial and be presumed innocent, since it is the  
26 government who has the burden of proving his guilt beyond a reasonable doubt.

27 2. To testify or not to testify at trial, and that no comment could be made by  
28 the prosecution in relation to his decision not to testify.

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3 3. To a trial before a district judge and a jury, at which he would be entitled  
4 to see and cross examine the government witnesses, present evidence on his behalf,  
5 and challenge the government's evidence.

6 4. To have a verdict rendered by a jury which would have to be convinced of  
7 defendant's guilt beyond a reasonable doubt by means of competent evidence.

8 5. To use the subpoena power of the court to compel the attendance of  
9 witnesses.

10 Upon listening to the defendant's responses to questioning, observing his  
11 demeanor and his speaking with his attorney, it is determined that defendant knows  
12 his constitutional rights.

13 **C. Consequences of Pleading Guilty**

14 Upon advising defendant of his constitutional rights, he was further advised  
15 of the consequences of pleading guilty. Specifically, defendant was advised that by  
16 pleading guilty and upon having his guilty plea accepted by the court, he will be  
17 giving up the above rights and would be convicted solely on his statement that he is  
18 guilty.

19 Furthermore, defendant was admonished of the fact that by pleading guilty he  
20 would not be allowed later on to withdraw his plea because he eventually might  
21 disagree with the sentence imposed, and that if under any kind of supervision  
22 (probation or supervised release) that privilege could be revoked and he could be  
23 required to serve an additional term of imprisonment.

24 **D. Plea Agreement**

25 The parties have entered into a written plea and that, upon being signed by the  
26 government, defense attorney and defendant, was filed and made part of the record.  
27 Defendant was clearly warned and recognized having understood that:

28 1. The plea agreement is not binding upon the sentencing court.

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3 2. The plea agreement is an "agreement" between the defendant, defense  
4 attorney and the attorney for the government which is presented as a  
5 recommendation to the court in regards to the applicable sentencing adjustments  
6 and guidelines.

7 3. The agreement provides a sentencing recommendation and/or anticipated  
8 sentencing guideline computation, that can be either accepted or rejected by the  
9 sentencing court.

10 4. In spite of the plea agreement and any sentencing recommendation  
11 contained therein, the sentencing court retains full discretion to reject such plea  
12 agreement and impose any sentence up to the possible maximum penalty prescribed  
13 by statute.

14 Defendant acknowledged having understood this explanation.

15 **E. Government's Evidence (Basis in Fact)**

16 The government presented a proffer of its evidence with which the defendant  
17 concurred. The government's proffer complied with and tracked in part the  
18 statutory language of the information.

19 Accordingly, it is determined that there is a basis in fact and evidence to  
20 establish all elements of the offense charged.

21 **F. Voluntariness**

22 The defendant accepted that no leniency had been promised, no threats had  
23 been made to induce him to plead guilty and that he did not feel pressured to plead  
24 guilty. He listened attentively as the prosecutor outlined the facts which it would  
25 prove if the case had proceeded to trial.

26 **IV. Conclusion**

27 The defendant, by consent, has appeared before me pursuant to Rule 11,  
28 Federal Rules of Criminal Procedure, and has entered a plea of guilty as to the only  
count of the information.

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After cautioning and examining the defendant under oath and in open court, concerning each of the subject matters mentioned in Rule 11, as described in the preceding sections, I find that the defendant Iván Cabrera Garay is competent to enter this guilty plea, is aware of the nature of the offenses charged and the maximum statutory penalties that the same carries, understands that the charges are supported by the government's evidence, has admitted to every element of the offense charged, and has done so in an intelligent and voluntary manner with full knowledge of the consequences of his guilty plea.

Therefore, I recommend that the court accept the guilty plea of Iván Cabrera Garay and that the defendant be adjudged guilty as to the only count of the information.

This report and recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B) and Rule 72(d) of the Local Rules of Court. Any objections to the same must be specific and must be filed with the Clerk of Court within five (5) days of its receipt. Rule 510.1, Local Rules of Court; Fed. R. Civ. P. 72(b). Failure to timely file specific objections to the report and recommendation is a waiver of the right to review by the district court. United States v. Valencia-Copete, 792 F.2d 4 (1<sup>st</sup> Cir. 1986).

At San Juan, Puerto Rico, this 24<sup>th</sup> day of February, 2006.

S/ JUSTO ARENAS  
Chief United States Magistrate Judge